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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BLAZER CORPORATION,

Petitioner,

—v.—

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. MCCRANE and "JOHN DOES", said names being fictitious,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: June 3, 1983

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Petitioner submits this brief, pursuant to the provisions of Rule 22.5 of this Court, in reply to the opposition briefs of respondents. It deals with the arguments first raised in respondents' briefs that this Court should deny the petition because the *ratio decidendi* of the Third Circuit, in affirming the decisions appealed from, did not involve the issues of the statute of limitations, *respondeat superior,* administrative exclusion, and post-deprivation remedies availability grounds underlying the District Court opinions, but instead involved its own unarticulated determination that the complaint did not "state a cause of action". See Brief of Respondent New Jersey Sports and Exposition Authority, p.12 (referred to hereafter as

the "Sports Authority Brief") and Brief of Individual Respondents, pp.14, 15 and 16.

The Third Circuit affirmed the two District Court opinions appealed from with the language:

> "Since the complaint fails to state a cause of action for violation of that section, it is ORDERED, ADJUDGED and DECREED that the judgment be and is hereby affirmed."

As counsel for the Sports Authority explains the theory of affirmance on mystery grounds,

> "While [the statute of limitations and *respondeat superior*] . . . grounds may have formed the basis for the judgments of the District Court, they clearly did not form the basis for the judgment of the Court of Appeals for the Third Circuit." (Sports Authority Brief p.12 (note))

By suggesting that what the Third Circuit upheld in affirming the decisions appealed from was not the issues ruled upon below but instead some unarticulated and undisclosed insufficiency in the amended complaint, respondents are injecting a red herring into the *certiorari* petition process. Not even respondents are bold enough to suggest what were the amended complaint's inadequacies upon which the Third Circuit's affirmance was based (notwithstanding the penchant of counsel for the Sports Authority for straying beyond the record below (See, e.g., the second note at p.12 of Respondent Sports Authority's brief)). They merely suggest that because the Third Circuit said nothing more than it did, it must have been deciding a new issue not dealt with in the District Courts.

Petitioner suggests that respondents' reasoning defies logic and order in any reasonable system of appellate review. If the Third Circuit, affirming the decisions below were doing so on the basis of entirely new issues, the minimum which a system of ordered justice requires would have been a brief articulation of what those issues were.

However, we need not speculate long about the choice of language utilized by the Court of Appeals. A brief review of the District Court opinions establishes the context of the Third Circuit's phrase "fails to state a cause of action". As the District Court observed in the opinion of November 16, 1981 (Petition Appendix at pp. 16a-25a):

> "A statute of limitations defense is properly considered a species of the defense of failure to state a claim upon which relief can be granted." (*id* at p.18a)

To be sure, the District Court in the November 16, 1981 opinion, after dismissing the complaint against the Sports Authority on statute of limitations grounds, went on to dismiss the complaint against individual defendants for failure to state a cause of action. However, it also granted leave to amend (*id.* at p.23a).

Petitioner did serve an amended complaint (See Petition Appendix at p.28a), and the decision of March 1, 1982 followed. That decision (Petition Appendix pp.26a-35a) granted the motion to dismiss on specific grounds which are raised in the Petition as issues for consideration by this Court. In so ruling the Court held that the amended complaint failed to state a cause of action against the Authority because it was predicated upon notions of *respondeat superior* (*id.* at 30a). It also held that the amended complaint failed to state a cause of action against individual respondent Werblin because his derelictions were merely part of an administrative plan and not of constitutional dimension (*id.* at p.33a-35a). In each instance the District Court ruled that the amended complaint "fails to state a claim cognizable under Section 1983" (*id.* at 34a). We submit that these references were adopted and incorporated by the Third Circuit when it held that the amended complaint "fails to state a cause of action". Fairly construed, the language thus incorporates not only the statute of limitations issue but also the *respondent superior* and administrative remedies issue briefed by petitioner.

The Third Circuit's ruling is "cryptic", as we originally characterized it, because it does not single out the precise areas which the Circuit Court found to be legally deficient. It can therefore only be concluded that the Circuit Court affirmed in all respects the District Court opinions appealed from. It was upon that basis that petitioner framed its petition for writ of *certiorari*, challenging the specific reasoning of the District Courts, which by a fair construction of the language of the affirmance, it submits that the Third Circuit adopted.

In fact the Complaint did generally state a cause of action. Indeed, a decision of the District Court's Chief Judge Clarkson F. Fischer so ruled (See Appendix to Petition pp.13a-15a):

> ". . . Thus, a cognizable claim under § 1983 has been alleged.
>
> Since plaintiff has alleged a valid § 1983 claim, there is generally no need to exhaust state administrative or judicial remedies . . ." (*id.* at 14a)

This decision was *not* appealed from by any respondent.

Finally, counsel for petitioner object professionally to the repeated resort by counsel for the Sports Authority to allegations that petitioner has "misrepresented" the record and has made "factually misleading" arguments (See Sports Authority Brief at p.12 (notes). See also pp.27, 29.) Such loose, unsupported and desperate allusions serve to highlight the insecurity which respondent's counsel must sense about the strength of their client's position. Counsel for petitioner will gladly suffer these professionally unjustified slings and arrows as their contribution to the cause of emphasizing the strength of petitioner's case.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully renews its request that this Court grant the petition for writ of *certiorari* to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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